Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1998

LARRY B. AND SHIRLEE ALEXANDER, et al. and
WILLIAM AND CHARMOND ADKINS, et al.
Petitioners,

v.

UNITED STATES OF AMERICA, et al.
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Howard M. Goodfriend
Counsel of Record
Malcolm L. Edwards
EDWARDS, SIEH, SMITH & GOODFRIEND
701 Fifth Avenue, Suite 7170
Seattle, WA 98104
(206) 624-0974
Attorneys for Petitioners Alexander, et al.

Eric Richter
HENKE & RICHTER
221 First Ave. W., Suite 215
Seattle, WA 98119
(206) 282-2911
Attorneys for Petitioners Adkins, et al.

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QUESTIONS PRESENTED

In 1855, the respondent Indian tribes entered into five treaties with the United States, agreeing to cede their aboriginal lands in western Washington Territory for settlement. The treaties secured to the Tribes the "right of taking fish at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory." The Tribes' right to take shellfish was limited by a specific proviso: "provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens." Since joining the Union in 1889, the State of Washington, with the consent of the United States and without objection from the Tribes, has sold approximately half of its tidelands. These private tidelands are now owned by thousands of individuals, most of whom also own and occupy the adjoining upland property.

1. Does the treaty "right to take fish . . . in common with all citizens" grant to western Washington Indian tribes the right to enter on and harvest shellfish from thousands of parcels of privately owned tidelands that were conveyed in fee by the State of Washington?

2. By posting their property to exclude others do private owners "stake" tidelands within the meaning of the treaty proviso prohibiting Indian tribes from taking "shell-fish from any beds staked or cultivated by citizens"?

PARTIES TO THE PROCEEDINGS

Petitioners, intervenor-defendants and appellants below, consist of two separate groups of private property owners in the State of Washington:

a. Larry B. and Shirlee Alexander, Harold E. and Billie B. Bauer, James and Ann Carter, William J. and Jeanette Chase, Mrs. Frances A. Fellows, George L. Grader, Earl D. and Millicent Ann Hunsperger, Edward B. and Eleanor J. Krenz, H.J. Merrick, Gordon W. Moss, Sewall L and Emma M. Reynolds, John D. Riach, Alva Hazel B. Robb, Irene D. Smith and Providence Worley.

b. William and Charmond Adkins, Grace Boyd, Pierce W. and May H. Davis, Ms. Rosemary Duncan, James E. Hadley, James C. and Sarah H. Johnston, William and Jo Ann Kirsh, David A. Mitchell, Mr. Louis Nawrot, Robert and Sandra Stevenson, and Boon Ho Woo.

Petitioners are collectively referred to as "Private Owners."

Respondents, defendants-appellants below, are the State of Washington, the Puget Sound Shellfish Growers Association ("Growers"), consisting of:

Taylor United, Inc.; Olympia Oyster Company; J&G Gunstone Claims, Inc.; G.R. Clam & Oyster Farm; Cedric E. Lindsay; Minterbrook Oyster Company; Charles and Willa Murray; Skookum Bay Oyster Company, and

26 Tideland and Upland Owners (UPOW):

Dan Buehler, Robert L. Davis, Bruce I. Fielding, Arthur J. Gerdes, Joe Hotts, Keith C. Heutson, Commander John C. James, Richard Sayre Koch, Elaine C. Lefler, Joan Lemonds-Roush, John S.

Lewis, Steven L. Luke, Edwards R. McMillan, Robert F. Newman, Mark A. Hysether, Arthur I. Price, Ray D. Randall, Cynthia Rasmussen, Robert G. Shanks, Axel Strakejahn, Leana Tracy, Stuart W. Turner, George B. Usnick, Lee S. Vincent, Joan Walker, and William E. Whitney, Jr.

Respondents, plaintiffs and appellees/cross-appellants below, are the United States of America and the following Indian tribes in western Washington State ("Tribes"):

Muckleshoot Tribe, Noosack Tribe, Upper Skagit Tribe, Szuaxin Island Tribe, Lummi Indian Tribe, Makah Tribe, Tualip Tribe, Swinomish Indian Tribal Community, Quileute Indian Tribe, Puyallup Tribe, Hoh Indian Tribe, Suquamish Tribe, Suquamish Tribe, Quinault Indian Nation, Confederated Tribes & Bands of the Yakima Indian Nation, Nisqually Indian Tribe, Jamestown Tribe, Lower Elwha Klallam Tribe, Port Gamble Bands, Skokomish Tribe, Sauk-Suiattle Tribe, Stillaguamish Tribe.

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PETITION FOR WRIT OF CERTIORARI

The petitioners, private owners of tidelands and adjacent upland property, ask this Court to issue a writ of certiorari to review the judgment of the Court of Appeals for the Ninth Circuit described below.

OPINIONS AND JUDGMENTS BELOW

The Ninth Circuit's opinion was initially filed on January 28, 1998. The Ninth Circuit amended its opinion and denied rehearing en banc on September 25, 1998. App. 1, reported at 157 F.3d 630. That opinion affirmed the decision of the district court for the Western District of Washington reported at 873 F. Supp. 1422, App. 51, and affirmed in part and reversed in part the district court's decision reported at 898 F. Supp. 1453 and 909 F. Supp. 787, App. 95, 135.[1]

JURISDICTION

The Court of Appeals entered its final judgment on September 25, 1998. This Court has jurisdiction under 28 U.S.C. § 1254(1).

TREATY PROVISIONS INVOLVED

Treaty of Medicine Creek, 10 Stat. 1132 (1855), App. 169; Treaty of Point Elliott, 12 Stat. 927 (1859), App. 177; Treaty of Point No Point, 12 Stat. 933 (1859), App. 187; Treaty of Neah Bay, 12 Stat. 939 (1859), App. 195 and the Treaty of Olympia, 12 Stat. 971 (1859), App. 203.

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[1]Appendix citations are to the joint appendix filed by the State of Washington in this case and the companion cases of ***Washington v. United States***, No. 98-_____, ***Puget Sound Shellfish Growers v. United States***, No. 98-_____ and ***26 Tideland and Upland Private Property Owners ("UPOW") v. United States***, No. 98-_____.

STATEMENT OF THE CASE.

This dispute arises from the Tribes' asserted right to enter upon and take shellfish from tidelands conveyed to private individuals in fee by the State of Washington. Under five treaties negotiated with the United States in 1855, the respondent Tribes ceded their aboriginal lands in western Washington Territory for settlement. The treaties secured to the Tribes the "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory. . . ." That right to take shellfish, however, was limited by this proviso: "Provided, however, that they shall not take shell-fish from any beds staked or cultivated by citizens." The courts below held that the right to take fish "in common with" all citizens allows Indians to harvest shellfish on private tidelands from which the general public is excluded and that this right is not limited by the treaty language prohibiting Indians from harvesting shellfish from "any beds staked or cultivated by citizens."

Today, 53 percent of the tidelands in the treaty area are privately owned. The remainder are owned by the State, the United States, and the Tribes. Ex. US-181.

A. The Puget Sound Treaties Were Negotiated By The United States To Foster Development Of Cities, Tidelands And Farms, And To Forever Settle All Indian Claims To The Territory.

The treaties at issue were negotiated in late 1854 and 1855 by a treaty commission led by Washington territorial governor Isaac Stevens. Stevens was eager to conclude treaties with the Puget Sound Indians because he believed, as did the

Indians, that the region would soon be overwhelmed by a tide of settlers. App. 68, 70; Ex. D-046; *see* ***Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n***, 443 U.S. 658, 661 (1979) (treaties executed "[t]o extinguish the last group of conflicting claims to land lying west of the Cascade Mountains and north of the Columbia River. . .").

At treaty time, virtually all the commercial life of the Puget Sound settlements was carried out on the tidelands. The inland terrain was steep and forested and settlement was clustered along the shoreline of Puget Sound, in sheltered bays and inlets. Transcript 239. The bays where settlements grew were, coincidentally, the places where shellfish naturally thrived. Transcript 239; Ex. D-036 at 74. Aided by the federal government, developments of mills, homes and shipyards took over large areas of these tidelands, prohibiting the harvesting of shellfish beds. App. 71-72.

In the 1850's, as now, states had the undisputed right to convey complete ownership in their tidelands and to shellfish beds located in tidelands. Transcript 305-307; *see* ***Shively v. Bowlby***, 152 U.S. 1, 26 (1894); ***Pollard's Lessee v. Hagan***, 44 U.S. (3 How.) 212 (1845). States regularly conveyed tidelands, particularly in urban areas such as San Francisco Bay, where California granted the shoreland bed to San Francisco to plat and sell as part of that city. Ex. D-041; D-467 at 57, discussed in ***United States v. Mission Rock Co.***, 189 U.S. 391, 406-07 (1903). In 1854, Stevens similarly encouraged Washington settlers to take up claims along the tidelands before planned donation land surveys, in order to better secure their ability to

obtain title from the future state. Ex. D-467 at 95; Transcript 519.

B. The Treaty Negotiations Reflect The Tribes' Understanding That Private Property Differed From Unclaimed Or Common Lands, And That The Settlers Marked Their Property With Stakes To Exclude Others.

The Tribes had well-developed concepts of property ownership even before the arrival of settlers. Transcript 454. In an earlier case interpreting these treaties, the district court recognized that the Tribes distinguished between the ownership of land and the sedentary resources it contained, such as shellfish, and migratory resources such as fin fish or animals:

> The record establishes that the Indians recognized exclusive property interests in land and in sedentary resources. However, the Indians viewed migratory fish and animals differently from stationary ones. The right to take fish existed when, and only when, the fish were within or passing through a tribe's particular territory. . . .
>
> . . .
>
> . . . Indians considered shellfish as sedentary creatures to be the property of the tribe within whose territory they were located.

United States v. Washington, 506 F. Supp. 187, 199-200 (W.D. Wash. 1980), *aff'd in part, rev'd in part,* 694 F.2d 1374 (9th Cir. 1982), *on reh'g*, 759 F.2d 1353 (9th Cir. 1985), *cert. denied*, 474 U.S. 994 (1985).

The Indians also understood the settlers' notion of private property as the right to exclude others from land and the resources on it, even from areas that the Tribes traditionally had used for hunting, gathering or shellfishing. Ex. D-064 at 345-

46, 358, 443; Ex. D-473 at 50-51. One of the largest sawmills in the territory, established in 1854, excluded Indians from a traditional shellfish gathering site. Transcript 438.

The treaty Tribes thus understood that their ancestral lands were being taken over by settlers. In the treaty negotiations they sought to secure a permanent and exclusive home and a steady livelihood. Treaty discussions reflected the Indians' understanding that private property, including their own reservations, would be surveyed and marked by stakes, and that a deed or paper would be proof of ownership against third parties. Transcript 272, 453-54; Ex. D-064 at 364, 440-41. Tu-heh-uk, the Chehalis chief, told Governor Stevens, "I want a paper showing the bounds of the reserve. So that when a white man took it, I could show him. I want a place where whites could not settle." Ex. D-064 at 358.

C. The Treaties Were Interpreted In The Years Following Their Ratification To Allow Indians Continued Access To Traditional Salmon Fishing Grounds And To Limit To Unclaimed Tidelands Their Right To Gather Shellfish.

The five treaties negotiated by Stevens and the respondent Tribes provided for the survey and establishment of tribal reservations "for their exclusive use," allowing tribal members to live on "any land not in the actual claim and occupation of citizens" for only one year following ratification. *See, e.g.*, App. 196 (Treaty of Neah Bay). The Tribes received annuity payments for their ceded lands, as well as free schooling, medical care and training in trades. *See, e.g.*, App. 179-82 (Treaty of Point Elliott). Each treaty expressly allowed both the settlers and the Indians to own private property. The Indians

also had the right to fish in common with citizens, and to hunt and gather on open and unclaimed lands:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however,* That they shall not take shell-fish from any beds staked or cultivated by citizens, and that they shall alter all stallions not intended for breeding horses, and shall keep up and confine the latter.

See, e.g., App. 170 (Treaty of Medicine Creek).

Spurred by major federal harbor developments and support for completion of a transcontinental railroad, after treaty ratification the cities of Seattle, Tacoma, Bellingham and Port Townsend grew on tidelands containing shellfish beds which had been used by local tribes. Ex. D-470 at 19-28. In 1864, the territorial Legislature granted to commercial shellfish growers exclusive rights in natural oyster beds in southern Puget Sound. App. 63 n.11, Transcript 1936-37. By 1879, legislation gave citizens the right to claim up to ten acres of any newly discovered oyster beds. Session Laws of the Territory of Washington 118-20 (1879).

On November 1, 1889, Washington entered the Union "on an equal footing with the original States." App. 149. In its constitution, the new state claimed ownership of "the beds and shores of all navigable waters . . . ." Wash. Const. art. XVII, § 1, App. 152. The Legislature soon passed laws authorizing the

sale of tidelands "for commerce, trade or business." Wash. Laws 1895, ch. 178, §§ 54 and 62; Wash. Laws 1889-90 at 431. In its first session the Washington Supreme Court affirmed the state's "full power to dispose of [tidelands] subject to no restrictions save those imposed upon the legislature by the constitution. . ." ***Eisenbach v. Hatfield***, 2 Wash. 236, 245, 26 P. 539 (1891); *see also* ***Port of Seattle v. Oregon & Washington R.R. Co.***, 255 U.S. 56, 65 (1921) (recounting history of tideland development and noting that state was authorized to sell tracts of tidelands).

Consistent with Governor Stevens' promises, the treaties were, from the outset, interpreted as allowing the Indians to "hunt, fish and gather berries wherever they choose provided they do not interfere with private claims." Ex. D-090 (1867 letter from Superintendent of Indian Affairs). Thus, the United States in 1887 enforced the Tribes' rights against settlers who attempted to exclude Indians fishing for salmon or from traditional shellfishing grounds where the settlers had no exclusive rights. Ex. CA-001. But tidelands claimed exclusively by non-Indians were off limits to tribal shellfishing. The Tribes understood that they permanently lost their access to shellfish beds when settlers exercised their right to stake or cultivate such beds. Transcript at 431-34.

In 1905, the Commissioner of Indian Affairs ruled that the Treaty of Point Elliott, 12 Stat. 927, did not prevent the state of Washington from granting a lessee of its tidelands the right to exclude Indians (along with all others) from taking clams, even though "the clam beds in question have never been cultivated."

App. 212. Three years later, the Washington Supreme Court similarly held that the same state lessees could enjoin all persons, including Indians, from taking clams from the leased tidelands because, unlike fin fish, the clams "live, not merely upon, but actually within, the land [and]. . . in a very material sense, belong with the land." ***Sequim Bay Canning Co. v. Bugge***, 49 Wash. 127, 131, 94 P. 922 (1908).

The state's program to plat and sell tidelands continued from the year after Washington entered the Union, Wash. Laws 1889-90 at 431, until 1971, when the Washington Legislature repealed the statutes authorizing tideland sales. Wash. Laws 1971, 1st Ex. Sess. ch. 217, §2 at 994. Today, thousands of upland owners on Puget Sound's inlets and coves own adjacent tidelands, that are, quite literally, their backyards. The district court found that these petitioners took title without any notice of the Tribes' treaty claims, which were first asserted in 1989:

> The Shellfish Growers and Private Property Owners are, effectively, innocent purchasers who had no notice of the Tribes' Treaty fishing right when they acquired their property. Indeed, many of these Growers and Owners purchased their land at or before the turn of the century, and they reasonably believed the land to be free of encumbrances and servitudes. Their belief was reinforced by the Tribes' failure to formally assert the Treaty right until over 100 years after the Stevens Treaties were signed.

App. 97.

D. The Lower Court Rulings.

This case was brought in 1989 by the United States and plaintiff Tribes against the State of Washington as a subproceeding to the 1970 fishing rights case. *See* ***United States v. Washington***, 384 F. Supp. 312 (W.D. Wash. 1974) ("***Washington I***"), *aff'd*, 520 F.2d 676 (9th Cir. 1975) ("***Washington II***"), *aff'd sub nom.*, ***Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n***, 443 U.S. 658 (1979) ("***Fishing Vessel***"). Petitioners, who are only a few of the thousands of individuals who own residential property that includes tidelands conveyed to them in fee, became defendants after seeking intervention. Docket 11623, 13561, 13668.

In bifurcated proceedings, the district court first entered an order declaring that the treaties secured to the Tribes the right to take 50 percent of the naturally occurring shellfish on both public and private tidelands. App. 51-93. In the second phase, the district court entered an implementation order. App. 95-134. This order authorized the Tribes to determine the quantity of available shellfish for harvesting by surveying any Private Owners' tidelands for shellfish following notice to the affected owner. App. 125. Private Owners may contest the Tribes' survey results by obtaining their own surveys. Disputes over the harvestable shellfish population are resolved by a special master. App. 126. The Tribes may then conduct harvests on Private Owners' tidelands up to five days per year. App. 127. Amending its implementation order, the district court further authorized tribal members to seek permission from a special master to cross private upland property to exercise

shellfishing rights on tidelands that lack access by boat or public road or right of way. App. 142-43. The special master is authorized to assess damages against tribal members who damage a Private Owner's property while exercising shellfishing rights. App. 127, 148.

All parties appealed the district court's final judgment. The Ninth Circuit affirmed the district court's interpretation of the treaties and most of the implementation order affecting the Private Owners. App. 23-25, 26, 38. However, in response to the Tribes' contention that Indians should be authorized to cross private upland property in the absence of "reasonable" alternative means to access tidelands, the Ninth Circuit directed the district court on remand to clarify its order regarding tribal access across the Private Owners' upland properties. App. 38 n. 16.

REASONS FOR GRANTING THE WRIT

Until this case, neither this Court, nor any of the Courts of Appeals, had held that an Indian treaty secured to Indian tribes a right to take resources from private lands. The Ninth Circuit's decision imposed servitudes on the very lands that the Tribes ceded when they entered into these treaties, in conflict with decisions of the Seventh and Eighth Circuits.

This Court has previously addressed the Stevens Treaties' "right of taking fish in common with all citizens," holding that these treaties reserved to the Tribes 50 percent of the sustainable catch of salmon that migrated from the ocean to the Indians' "usual and accustomed grounds and stations." ***Fishing***

Vessel, 443 U.S. 658, 685 (1978).[2] Relying on this Court's salmon precedents, the Ninth Circuit held that the right to take fish "in common with" Washington citizens gives the Tribes the right to enter on private property and to take 50 percent of the harvestable shellfish from the Private Owners' tidelands. This decision ignores the differences between migratory salmon, which can be monopolized by limitations on tribal access, and immobile shellfish that may be harvested on public and tribal lands throughout the territory ceded by these treaties.

Even if the right to take fish "in common with" Washington citizens could secure to the Tribes a right to take shellfish from tidelands from which the public is excluded, these treaties contain an express limitation–a treaty proviso prohibiting the harvest of shellfish on tideland beds "staked or cultivated by citizens." The Ninth Circuit failed to construe this proviso in light of the strong presumption that the treaties did not limit the State of Washington's right to convey private ownership interests in its tidelands free of any pre-statehood reservation of interest. The decision below adopts a technical definition of the term "staked" that was unknown to the treaty

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[2] These and similarly worded treaties were considered in six cases before the ***Fishing Vessel*** decision. *See*, ***United States v. Winans***, 198 U.S. 371 (1905); ***Seufert Bros. Co. v United States***, 249 U.S. 194 (1919); ***Tulee v. Washington***, 315 U.S. 681 (1941); ***Puyallup Tribe v. Washington***, 315 U.S. 681 (1942); ***Puyallup Tribe v. Dep't of Game of Washington***, 391 U.S. 392 (1968); ***Dept. of Game of Washington Game v. Puyallup Tribe***, 414 U.S. 44 (1973); ***Puyallup Tribe v. Dep't of Game of Washington***, 433 U.S. 165 (1977). However, none of these cases considered the Indians' right to harvest shellfish from tidelands.

Indians, analyzing legal issues of ultimate treaty interpretation as questions of fact reviewable only for clear error.

This Court should issue the writ and interpret the treaties in light of their plain meaning, their historical purpose of freeing the ceded lands from all Indian claims, and the constitutional presumption that the State of Washington could make its own laws and policies governing its tidelands free of any pre-statehood reservation of interest.

A. The Court Of Appeals' Decision Is An Unprecedented Extension Of Tribal Usufructuary Rights To Privately Owned Property That Is Unnecessary To Preserve The Tribes' Meaningful Access To Shellfish.

The Ninth Circuit's holding that the "right of taking fish in common with" the citizens of Washington allows the Tribes to harvest shellfish on privately owned tidelands is an unprecedented imposition of tribal usufructuary rights on private property. Its opinion conflicts with decisions of other circuits, cannot be supported by this Court's decisions interpreting the treaty right to migratory salmon, and is unnecessary to preserve to the Tribes meaningful access to an immobile resource found on public and reservation lands throughout the treaty territory.

1. The Treaty Right to Take Fish "In Common With" Citizens Does Not Extend To Shellfish On The Private Owners' Lands.

The petitioners' right to exclude others from their land is an unquestionable and essential attribute of ownership:

> We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks

> in the bundle of rights that are commonly characterized as property . . . ."

Nollan v. California Coastal Comm'n, 483 U.S. 825, 831 (1987) (citations omitted). The right to take fish "in common with" Washington citizens does not give Indians the right to enter tidelands from which the Private Owners exclude others.

This Court has previously noted that it will not lightly extend tribal usufructuary rights to private property. In ***Antoine v. Washington***, 420 U.S. 194 (1975), the Court interpreted an 1891 agreement returning unallotted land within the Colville Indians' reservation to the public domain. The agreement provided that "'the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged.'" ***Antoine***, 420 U.S. at 197 n.4 (quoting agreement). This Court held that the right to hunt "in common with all other persons" only prevented the state of Washington from regulating hunting by tribal members on public lands, expressing doubt that such a hunting right could extend to private lands:

> A claim of entitlement to hunt on fenced or posted private land without prior permission of the owner would raise serious questions not presented in this case.

Antoine, 420 U.S. at 207-08 n.11; *see also* ***Oregon Dept. of Fish and Wildlife v. Klamath Indian Tribe***, 473 U.S. 753, 764 (1985) (Klamath tribe "agrees that ceded lands now privately owned may be closed to tribal hunting and fishing.").

Similarly, other Courts of Appeals have properly recognized that the primary purpose of nineteenth century

Indian treaties was the cession of aboriginal lands for non-Indian settlement, and that consequently privately owned non-Indian lands are off limits to tribal harvesting. Both the Seventh and Eighth Circuits have held that the Chippewa may not enter private land to exercise the treaty right of "hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded," Treaty with Chippewas, July 29, 1837, 7 Stat. 536:

> The ceded territories were ceded for the purpose of eventual settlement. Some may never be settled but others may be, and that settlement by going into private hands simply should not be subject to the reserved usufructuary rights.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin, 760 F.2d 177, 182 (7th Cir. 1985); ***Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt***, 700 F.2d 341, 365 (7th Cir. 1983) ("The exercise of these rights is limited to those portions of the ceded lands that are not privately owned."); ***Mille Lacs Band of Chippewa Indians v. Minnesota***, 952 F. Supp. 1362, 1378 (D. Minn.) (Chippewa "treaty rights . . . may only be exercised on lands, public or private, open to the general public for hunting, fishing and gathering by operation of state law."),*aff'd*, 124 F.3d 904, 933-34 (8th Cir. 1997), *cert. granted* __ U.S. __ (1998) (No. 97-1337).

The western Washington Tribes ceded all their "right, title and interest in and to the lands and country occupied by them" as did the Chippewa of Minnesota and Wisconsin. *See, e.g.* App. 178 (Treaty of Point Elliott, art. II). The future State's

right to convey tidelands to the exclusive possession of the Private Owners is as absolute as the United States' ability to patent exclusive title in the land ceded by the Chippewa. *See* Argument at § B.1, *infra*. The Ninth Circuit holding that the "right of taking fish . . . in common with all citizens" gives the Tribes the authority to enter on and harvest shellfish from thousands of privately owned parcels of property in Washington State conflicts with the decisions of other circuits that have properly recognized that extending tribal treaty rights to private lands is contrary to the very purpose of the Indian treaties.

2. Access To Privately Owned Tidelands Is Not Supported By This Court's Precedent And Is Not Necessary To Secure To The Tribes Meaningful Access To A Stationary Resource Found On Public And Reservation Tidelands.

This Court has imposed a narrow easement on private lands to enable Indians to exercise off-reservation salmon fishing rights only where necessary to secure meaningful access to a migratory resource, and only where the easement is analogous to a prescriptive right to access a usual and accustomed fishing site. The courts below misread this Court's precedent in imposing an unlimited extension of tribal usufructuary rights to thousands of individual Washington property owners.

In ***United States v. Winans***, 198 U.S. 371 (1905), this Court held that treaty Indians had a right to use a well-established trail over private land to their ancient fishing station

on the bank of the Columbia River.[3] The Court held that the treaty "fixes in the land such easements as enable the [fishing] right to be exercised." ***Winans***, 198 U.S. at 384. But the ***Winans*** holding did not grant the Indians a right to access all private land from which fish might be taken. The "usual and accustomed place" at issue in ***Winans*** was an obvious trail to an established fishing station in frequent and customary Indian use from treaty times to the date the land was patented. A ***Winans*** easement, as later described by this Court, must be "habitual," "customary," and "open and notorious." Consistent with well-established property principles, it exists:

> only where there was an habitual and customary use of the premises, which must have been so open and notorious during a considerable portion of each year, that any person, not negligently or wilfully blind to the conditions of the property he was purchasing, must have known of them.

Seufert Bros. Co. v. United States, 249 U.S. 194, 199 (1918).

The decisions below conflict with ***Winans*** and ***Seufert*** by granting tribal access to thousands of properties without any showing that the Tribes made historically open and consistent use of access easements on those properties. Rather than limiting tribal easements to those private uplands where "any person, not blind to the conditions of the property, must have

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[3]The case concerned similar language ("the right of taking fish at all usual and accustomed places") from a treaty negotiated by Governor Stevens with an inland tribe that fished at a site described by the Solicitor General as "a famous one . . . one of the best, if not the best place on the Columbia River." ***Winans***, 198 U.S. at 371 (Argument of United States).

known of them," ***Seufert***, 249 U.S. at 199, the courts below imposed an access easement of necessity on any upland property wherever "tribal members can demonstrate the absence of access by boat, public road, or public right of way." App. 142-43. This blanket easement over both tidelands and uplands, without any proof of historic use, is unsupported by this Court's precedents or by any principle of property law or treaty interpretation.

The unique nature of the migratory salmon resource was of critical importance in the relief granted by the Court in ***Winans*** and ***Seufert***. Access alone was insufficient to give meaning to the right to fish "in common with" non-Indians whose fish wheels took all of the salmon as they migrated upriver. ***Winans***, 198 U.S. at 372 (Argument of United States). Access to their ancient fishing site and removal of the fish wheels was thus necessary to assure the Indians "a share of the fish" and to "protect them from total exclusion from the fishery." ***Fishing Vessel***, 443 U.S. at 681.

The migratory nature of the salmon resource underlies this Court's holding that these treaties reserve to the Tribes salmon "taken from runs of fish that pass through the Indians' usual and accustomed fishing grounds." ***Fishing Vessel***, 443 U.S. at 689. Shellfish, however, are not migratory. In contrast to the free-swimming salmon at issue in this Court's previous cases concerning these treaties, shellfish found in privately owned land are immobile, and have historically been regarded as in the possession of the owner of the land where they are found:

> [T]here is a plain distinction between [embedded shellfish] and game birds or freely moving fish . . . . Such birds and fishes are not even in the possession of man. On the other hand, it seems not unreasonable to say that mussels having a practically fixed habitat and little ability to move are as truly in the possession of the owner of the land in which they are sunk as would be a prehistoric boat discovered under ground or unknown property at the bottom of a canal.

McKee v. Gratz, 260 U.S. 127, 135-36 (1922) (Holmes, J.) (mussels in Missouri stream bed) (citations omitted); *see also* ***Den ex. dem. Russell v. Association of the Jersey Co.***, 56 U.S. (15 How.) 426, 432-33 (1853).

Judge Beezer's opinion concurring in the decision below properly recognized that ***Winans*** and ***Fishing Vessel*** are based on the mobility of salmon, which must travel from the ocean upriver to their spawning grounds. Because shellfish are fixed in the tidelands, however, excluding Indians from Washington's private tidelands does not deprive the Tribes their treaty share:

> The underpinning of the [Supreme] Court's interpretation of the Stevens Treaties should not apply to shellfish because they are, with the exception of crustaceans, immobile. There can be no device that prevents the migration of immobile shellfish to, through or from the tribes' usual and accustomed fishing grounds.

App. 44 (Beezer, J., concurring). Each of the treaty Tribes' "usual and accustomed" fishing grounds, which together comprise all of Puget Sound, contain large areas of publicly held tidelands. It is in those tidelands that the Tribes have a treaty right to an equitable allocation of shellfish. The servitude

imposed upon Washington tideland owners by the courts below is not necessary to preserve the Tribes' right to "a fairly apportioned share" of the resource. ***Fishing Vessel***, 493 U.S. at 682.

The mechanistic application of ***Fishing Vessel's*** analysis to allocate 50 percent of stationary shellfish between the owners of private tidelands and the Tribes moreover resulted in the improper imposition on these private individuals of an extensive regulatory framework and dispute resolution process originally developed to preserve the Tribes' interest in each run of migrating salmon. App. 125-28. Such burdens, imposed not on sovereign entities responsible for common resources but on private landowners, will require continuing judicial intervention in the lives of thousands of Washington residents.

Under the Ninth Circuit's decision, the Indians have the right not just to take a fair share of shellfish "in common with" Washington citizens, but the exceptional authority to harvest shellfish on private tidelands from which the general public is lawfully excluded. The imposition of such a servitude on thousands of privately owned properties on the basis of a treaty right to fish "in common with all citizens of the Territory," raises an important issue of federal law that should be definitively resolved by this Court.

B. The Shellfish Proviso, Which Prevents The Tribes From Taking Shellfish From "Any Beds Staked Or Cultivated By Citizens," Prohibits Indians From Harvesting Shellfish On Tidelands Posted By Private Owners To Exclude Others.

The Private Owners stake and post their tidelands to mark their boundaries and exclude others. In the Shellfish Proviso, the treaty drafters expressly authorized the future state to limit the Indians' ability to enter on and harvest shellfish from "any beds staked or cultivated by citizens." The Ninth Circuit erred in refusing to construe this proviso in light of the established constitutional presumption against pre-statehood reservations of property interests under the equal footing doctrine. Moreover, the Ninth Circuit eschewed both the plain language of the treaties and the Indians' understanding that land was staked in order to mark boundaries and exclude others by holding that the term "staked" had a narrow and technical definition, limited to the marking of artificial shellfish beds to temporarily store shellfish, based on shellfishing practices then prevalent only on the East Coast.

1. The Treaty Drafters Did Not Intend To Limit The Future State's Ability To Establish Private Property Rights In Tidelands Under The Equal Footing Doctrine.

State control and title to the soil underlying navigable waters is one of the essential attributes of state sovereignty. *See* ***Idaho v. Coeur d'Alene Tribe of Idaho***, 521 U.S. 261, __ 117 S. Ct. 2028, 2041 (1997); ***Utah Div. of State Lands v. United States***, 482 U.S. 193, 195 (1987); ***Montana v. United States***, 450 U.S. 544, 552 (1981). Tidelands "were not granted

by the Constitution to the United States, but were reserved to the States respectively . . . The new States have the same rights, sovereignty, and jurisdiction over this subject as the original States." ***Pollard's Lessee v. Hagen***, 44 U.S. (3 How.) 212, 230 (1845). Each state entering the Union has the right "to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters . . . ." ***Shively v. Bowlby***, 152 U.S. 1, 30 (1894).[4] There is a "strong presumption" against pre-statehood grants of submerged lands. A court "must not infer such a conveyance 'unless the intention was definitely declared or otherwise made plain,' or was rendered in 'clear and especial words,' or 'unless the claim confirmed in terms embraces the land under the waters of the stream.'" ***Montana***, 450 U.S. at 552 (citations omitted); *accord* ***Utah Div. of State Lands***, 482

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[4]Canvassing the diverse state law regulating private and public rights in tidelands during the nineteenth century, the ***Shively*** Court noted:

> [E]ach State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public.

Shively v. Bowlby, 152 U.S. 1, 26 (1894); *see* ***Port of Seattle v. Oregon & Washington R.R. Co.***, 255 U.S. 56, 65 (1921) (reviewing Washington State's nineteenth century tideland law and development and noting that private ownership and development of tidelands was a valid means of economic growth).

U.S. at 197-98; ***United States v. Alaska***, 521 U.S. 1, __, 117 S.Ct. 1888, 1906 (1997).

The Ninth Circuit improperly rejected the presumption that the United States did not intend to reserve interests in the tidelands of the future State, reasoning that the equal footing doctrine applies only to fee interest conveyances. But in enunciating the equal footing doctrine, the ***Shively*** Court noted that the State's "title to the shore and lands under water" consists of the entire bundle of rights that makes up fee simple title, including the right to "dispose of the usufruct of such lands, as is frequently done by leasing oyster beds in them, and granting fisheries in particular localities . . . ." ***Shively***, 152 U.S. at 46 (quoting ***Hardin v. Lordan***, 140 U.S. 371, 381-82 (1891)). ***Winans***, which the courts below relied on in holding that "application of the Equal Footing Doctrine has already been rejected in the context of the Stevens Treaties fishing rights," App. 22, 82, analyzed the Yakima's reserved easement to access their ancient fishing stations in light of the presumption against a reservation of title to Columbia River shorelands. ***Winans***, 198 U.S. at 382-84.

The Tribes' claim to easements to enter upon and harvest shellfish from the property conveyed by the State to thousands of tideland owners, most of whom are not parties to the action, imposes the very "broad and vague servitude on all patented lands" that the Solicitor General disclaimed in seeking a specific easement over a specific parcel of land in ***Winans***. 198 U.S. at 373 (Argument of United States).

The equal footing doctrine's presumption against a conveyance or reservation of any portion of the future state's

title is especially strong where the right asserted to survive statehood is defeasible and not permanent:

> [W]here there are rights created by congress during the existence of a territory, which are of such a nature as to imply their perpetuity, and the consequent purpose of Congress to continue them in the State, after its admission, such continuation will, as a matter of construction, be upheld, although the enabling act does not expressly so direct. Here the nature of the right created gives rise to no such implication of continuance, since by its terms, it shows that the burden imposed on the Territory was essentially perishable and intended to be of a limited duration.

Ward v. Race Horse, 163 U.S. 504, 515 (1896). The Shellfish Proviso expressly terminates a tribe's treaty right to take shellfish on lands that are "staked or cultivated." As in ***Race Horse***, the Tribes' reserved interests in tidelands are similarly "perishable" and cannot attach to tidelands conveyed in fee by the State of Washington to private owners following statehood. The Ninth Circuit's rejection of the presumption against a pre-statehood reservation of interest in Washington's tidelands conflicts with established precedent and should be reversed.

2. The Treaty Drafters Used The Term "Staked" To Prohibit Shellfish Harvesting On Tidelands Marked And Claimed Exclusively By Settlers.

The Ninth Circuit ignored settled rules of treaty interpretation in refusing to define the term "staked" in light of its commonly understood meaning and the purposes of these treaties. Interpretation of treaty language is a question of law that "begins with the text of the treaty and the context in which

the words are used." ***Eastern Airlines, Inc. v Floyd***, 499 U.S. 530, 534 (1991). Indian treaties are "construed, not according to the technical meaning of its words to learned lawyers, but in the sense which they would naturally be understood by the Indians." ***Fishing Vessel***, 443 U.S. at 676; *see* ***United States v. Choctaw Nation***, 179 U.S. 494, 531 (1900) ("If the words be clear and explicit, leaving no room for doubt what the parties intended, they must be interpreted according to their natural and ordinary significance."). Where the language of the treaty is susceptible to more than one meaning the courts employ canons of construction to discern the intent of the parties, determining the meaning of treaty terms according to the treaty's history, the negotiations, and "the practical construction adopted by the parties." ***Choctaw Nation of Indians v. United States***, 318 U.S. 423, 431-32 (1943).

In crafting the Shellfish Proviso, the treaty drafters removed *two* types of tidelands from Indian shellfishing claims–those that were either "staked" *or* "cultivated." Each reference to staking in the treaty negotiations referred to the common practice of marking boundaries to claim land as one's own. *See e.g.* Ex. D-064 at 371 (If the Cowlitz moved, they "wanted a white man to stake it out and put down corner Stakes."). At treaty time, the verb "to stake" was defined as "to mark the limits of, by stakes driven, as of a piece of land . . ." Ex. D-083. The Tribes' right to enter tidelands to harvest shellfish thus could be terminated by "staking"–marking the boundaries of tidelands to exclude others.

Instead of interpreting the term "staked" in accordance with its common meaning at the time of frontier settlement, the

courts below held that a "staked" bed was limited to tidelands upon which harvested shellfish were temporarily stored awaiting export. App. 26, 60, 64-66. It based this interpretation on nineteenth century practices in the Chesapeake Bay, where private shellfish could be stored on public tidelands so long as they were marked and not commingled with any substantial quantity of natural shellfish. App. 64-66. Rather than applying a definition that reflects "the common notions of the day and the assumptions of those who draft the treaty," ***Oliphant v. Suquamish Indian Tribe***, 435 U.S. 191, 206 (1978), the courts below adopted a definition of the term "staked" that was unknown beyond the confines of the mid-nineteenth century East Coast shellfishing industry and that limited, rather than fostered, the future state's ability to convey fee title to its tidelands.

In light of the undisputed historical record, the Tribes did not claim, nor did the courts below hold, that the treaty right to shellfish limited in any manner the future State's ability to convey tidelands into private ownership:

> The Tribes have not claimed a right to take shellfish from areas where natural beds no longer exist, such as from tideland areas housing factories, the Kingdome, and mills and ports. The Tribes appear to have conceded that some of the development along the tidelands, but not all, has extinguished their right to take fish from those particular areas.

App. 72. But by holding that the treaties nonetheless allowed the Tribes to harvest shellfish on private tidelands where natural beds have not been extinguished by development, the courts below treated the settlers' occupation and development of

tidelands as an historical anomaly, rather than as the right that was bargained for and secured as the principal purpose of the treaties.

3. The Ninth Circuit Improperly Treats The Meaning Of Treaty Language As A Question of Historical Fact Reviewed For Clear Error, Rather Than A Question Of Law That Is Reviewed De Novo.

The Ninth Circuit relied on East Coast oystering practices to define the word "staked" in part because it failed to conduct a de novo review of this largely undisputed historical record, reviewing the trial court's determination of the treaty parties' intentions instead under the deferential standard of clear error:

> Given the deferential standard by which we review the district court's findings of historical fact and its findings regarding the intentions of the parties' negotiators, we conclude the district court did not err in interpreting the Proviso and we adopt its analysis as our own.

App. 26.

Interpretation of treaty language is a question of law even if treaty meaning turns on historical issues of legislative intent and purpose. The Ninth Circuit's deferential review of district court "findings" in this case was improper and conflicts with this Court's precedents. For instance, in ***Fishing Vessel*** this Court independently reviewed the historical record to determine the meaning of the Tribes' right to fish in common with citizens of Washington territory. 443 U.S. at 675, 679. This Court's more recent cases similarly engage in a de novo interpretation of treaty terms in light of the negotiating and drafting history as well as the post-ratification conduct of the signatory parties.

See ***Zicherman v. Korean Air Lines Co., Ltd.***, 516 U.S. 217, 221-28 (1996); ***Eastern Airlines, Inc. v. Floyd***, 499 U.S. 530, 535-52 (1991); ***O'Connor v. United States***, 479 U.S. 27, 32-33 (1986).

Issues of historical purpose and legislative intent do not turn on the accuracy of witness' recollections or credibility. *Cf.* ***Zenith Radio Corp. v. Hazeltine Research, Inc.***, 395 U.S. 100, 123 (1969) (deference to district court on factual issues based on its "superior position to apprise and weigh the evidence"). Instead, to the extent they enable courts to determine the ultimate meaning of the treaty, these questions of historical intent lie at the heart of the role of the appellate court to define the controlling precedent that affects the rights of future litigants. The Ninth Circuit's decision erodes the primacy of the appellate court's duty to interpret the law. If left intact, the decision reduces the appellate court's task in treaty interpretation to reviewing for clear error a lower court's "findings" on fundamental questions of legislative and historical intent.

C. The Tribes' Claim To Enter On Private Tidelands Is Barred By Laches.

The Private Owners' lands have been off limits to Indians, and any other persons seeking to enter upon them, since conveyed to them by the State. The Tribes' treaty rights, first asserted in 1989, conflict with the Private Owners' long-settled property rights. The Private Owners join in the argument of the Growers in their separate petition for certiorari, ***Puget Sound Shellfish Growers v. United States***, No. 98-____, that the Tribes' claims are barred by the doctrine of laches.

RESPECTFULLY SUBMITTED this 21st day of December, 1998.

HOWARD M. GOODFRIEND
Counsel of Record
MALCOLM L. EDWARDS
EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.
7170 Columbia Center
701 Fifth Avenue
Seattle, WA 98104
(206) 624-0974

Attorneys for Petitioners
Alexander, et al.

ERIC RICHTER
HENKE & RICHTER
221 First Ave. W., Suite 215
Seattle, WA 98119
(206) 282-2911

Attorneys for Petitioners
Adkins et al.